

MAR 17 2003

CC Docket No. 98-67

Released: March 14,2003

I. INTRODUCTION

⁶ 900 number services is a type of pay-per-call service. See 47 C.F.R. § 64.1501,

period for E' Relay providers. All waivers will be contingent on E' Relay providers filing an annual report with the Commission detailing the technological changes in these areas, the progress made, and the steps taken to resolve the technical problems that prohibit E' Relay providers from meeting the TRS mandatory minimum standards waived herein. These waivers of TRS mandatory minimum standards shall apply to all other current and potential IP Relay providers, for the same period of time indicated herein, beginning on the release date of this **Order on Reconsideration**. As set forth below, for administrative convenience all waivers granted herein will expire on January 1, 2008. Finally, we deny cost recovery to those IP Relay providers who have been providing E' Relay, prior to the effective date of this Order, without meeting all of the applicable TRS mandatory minimum standards, including those concerning HCO and 900 number services.

II. BACKGROUND

2. In the March 2000 *Improved TRS Report and Order*, the Commission concluded that TRS is not limited to the use of TTYs, but rather that "section 225 must be read to apply to any service that allows individuals with hearing and speech disabilities to communicate by wire or radio." Although the Commission declined to establish a single, formal process for determining whether any new service is part of TRS, it stated that "[a]s new services develop, parties may petition us for a determination as to whether a service falls within the definition of [TRS]." In the 2000 *Improved TRS Report and Order*, the Commission requested comment on a number of issues involving new and improved technologies, including "use of the World Wide Web for voice communications, internet telephony, and any other technologies or changes to technology that may improve Relay services or should be available via TRS."⁹

3. On December 22, 2000, WorldCom, Inc., (WorldCom) filed a Petition for Clarification,¹⁰ requesting that the Commission clarify that IP Relay¹¹ is a telecommunications relay service eligible for reimbursement from the Interstate TRS Fund.¹² WorldCom further sought temporary waiver of certain mandatory minimum standards for providing TRS, asserting that these standards do not apply to IP Relay. WorldCom also requested that the Commission allow it to recover the costs of all E' Relay calls from the

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⁷ Hearing Carry Over service is a reduced form of telecommunications relay service used by persons with speech disabilities who are able to listen to the other end user but, in reply, the communications assistant speaks the text as typed by the person with the speech disability. The communications assistant does not type any conversation. See 47 C.F.R. § 64.601(6).

⁸ Improved Service Order and Further Notice of Proposed Rulemaking, *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 98-67, FCC 00-56, 15 FCC Rcd 5140 at ¶ 14 (2000 *Improved TRS Report and Order*).

⁹ *Id.* at ¶ 138

¹⁰ WorldCom, *Petition for Clarification*, CC Docket No. 90-571, Dec. 22, 2000.

¹¹ IP Relay is telecommunications relay service provided over the Internet. IP Relay works as follows: 1) A user establishes a local connection to an Internet service provider using a computer, web phone, personal digital assistant, or any other IP-capable device; 2) the user selects the Internet address of an IP Relay provider; 3) when the user reaches the IP Relay provider's Internet platform (or web site), a java applet is launched, which then automatically establishes an internet connection, via an 800 number, to the relay center; and 4) the call is immediately routed to a communications assistant, and a regular relay session is initiated.

¹² 47 U.S.C. § 225(d)(3) requires that "costs from interstate telecommunications relay service shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay service shall be recovered from the intrastate jurisdiction." The Interstate TRS Fund was established to administer the recovery of costs for interstate TRS. See Telecommunications Relay Service, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, *Third Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5300 n.34 (1993).

Interstate TRS Fund. WorldCom stated that because calls come to IP Relay via the Internet, there is no way to tell whether a given call is intrastate or interstate, because Internet addresses have no geographic correlates. The Commission issued a Public Notice requesting comment on WorldCom's petition," and received comment from individuals, disability advocacy groups, and industry.

4. In the *IP Relay Order*, the Commission granted WorldCom's petition finding that IP Relay falls within the statutory definition of TRS, and that TRS providers providing such services are eligible to recover their costs in accordance with section 225 of the Communications Act of 1934, as amended.¹⁴ The Commission also temporarily or permanently waived some of the mandatory minimum standards applicable to TRS because they do not apply to IP Relay, or because IP Relay's technology requires further development to meet some standards.¹⁵ The Commission stated that the authorization and waiver applied to all other current and potential IP Relay providers.¹⁶

5. On May 22, 2002, WorldCom filed a petition for reconsideration of the *IP Relay Order* requesting that the Commission extend the emergency call handling, VCO, and STS waivers from a one year period to either a five year period or an indefinite time." On July 11, 2002, Sprint Corporation (Sprint) filed a petition for reconsideration of the *IP Relay Order* requesting that the Commission grant IP Relay providers waivers of the 900 number service and HCO TRS mandatory minimum standards." On July 22, 2002, the petitions for reconsideration were placed on Public Notice; five parties filed comments." All parties filing comments support both petitions for reconsideration. No comments in opposition to either petition were filed. On November 18, 2002, in an *ex parte* presentation, Sprint requested that if its petition for reconsideration is granted, the Commission clarify that Sprint (and other IP Relay providers that have been providing IP Relay service) are eligible to receive compensation for the

¹³ Consumer Information Bureau Seeks Additional Comment on the Provision of Improved Telecommunications Relay Service, DA 01-1555, *Public Notice*, 66 Fed. Reg. 37,631 (July 19, 2001).

¹⁴ *IP Relay Order*, 17 FCC Rcd 7779 at ¶ 1; See also U.S.C. § 255(a)(3).

¹⁵ For example, we waived the VCO and STS TRS mandatory minimum requirements. See *IP Relay Order*, 17 FCC Rcd 7179 at ¶32.

¹⁶ *IP Relay Order*, 17 FCC Rcd 7779 at ¶1.

¹⁷ See Petition for Reconsideration *WorldCom, Inc.*, In the Matter of Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CC Docket No. 98-67, filed by WorldCom Inc., on May 22, 2002 (*WorldCom Petition*).

¹⁸ See Petition for Limited Reconsideration, In the Matter of Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CC Docket No. 98-67, filed by Sprint Corporation July 11, 2002 (*Sprint Petition*).

¹⁹ See Comments filed by Hamilton Relay, Inc. (Hamilton) July 26, 2002, AT&T Corporation (AT&T) August 13, 2002, and Communication Services for the Deaf (CSD) September 3, 2002. See Late filed comments filed by Self Help for Hard of Hearing People (SHHH) December 5, 2002 and Telecommunications for the Deaf, Inc., (TDI) December 9, 2002. See also Motion for Acceptance of Late-Filed Comments filed by TDI December 9, 2002. We note that SHHH did not file a similar motion requesting acceptance of its late filed comments into the record. Nonetheless, in the interest of having a complete record, we accept TDI and SHHH's late filed comments into the record. See also Ex Parte letter from Michael Fingerhut, Sprint Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated November 18, 2002; Ex Parte letters from Larry Fenster, WorldCom, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated November 20, 2002 and January 23, 2003; Ex Parte letters from Margot Smiley Humphrey, Hamilton Relay Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated October 9, 2002 and December 2, 2002; Ex Parte letter from Gary Warren, Hamilton Relay Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated January 12, 2003; Ex Parte letter from Karen Peltz Strauss, CSD Consultant, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated December 5, 2002.

entire past period in which such carriers offered IF Relay, even if they did not offer 900 number service or HCO during that time period.”

III. DISCUSSION

6. **Waiver Standard.** In analyzing the applicability of our TRS mandatory minimum standards to IF Relay, we consider established legal standards for waiver of the Commission’s rules. The Commission will adhere strictly to its rules unless a party can demonstrate that “in the public interest the rule should be waived.”²⁰ Furthermore, the Commission may only waive a provision of its rules for “good cause shown.”²¹ The Commission must take a “hard look” at applications for waiver²³ and must consider all relevant factors when determining if good cause exists.²⁴ The party petitioning the Commission for a waiver bears the heavy burden of showing good cause: “[an] applicant [for a waiver] faces a high hurdle even at the starting gate.”²⁵ In addition, “[t]he agency must explain why deviation better serves the public interest, and articulate the nature of the special circumstances, to prevent discriminatory application and to put future parties on notice as to its operation.”²⁶ Finally, a waiver of one or more portions of the Commission’s rules does not excuse an applicant from compliance with the Commission’s other requirements.²⁷ Applying these standards, we find good cause exists to grant WorldCom’s²⁸ and Sprint’s waiver requests, to the extent indicated herein, and that doing so is in the public interest.²⁹

7. **Emergency Call Handling.** Our rules require TRS centers to provide “a system for incoming emergency calls that, at a minimum, automatically and immediately provides the nearest Public Safety Answering Point (PSAP) with the caller’s telephone number. In addition, a relay center must pass along the caller’s telephone number to the PSAP when a caller disconnects before being connected to emergency services.”³⁰ Because we have found that IF Relay falls within the statutory definition of TRS, IP Relay providers are obligated to maintain a system for handling emergency calls. In the *IP Relay Order*, however, we granted IP Relay providers a one year waiver of the TRS emergency call handling mandatory minimum standard because IF Relay providers are unable to provide location information to PSAPs. Because IP Relay users gain access to TRS via computer and an Internet address, rather than a telephone, IF Relay providers do not have the automatic number identification (ANI) of the calling party; therefore, they do not have the information to identify the caller’s location.³¹ We recognized that the

²⁰ See Sprint *ex parte* letter dated November 18, 2002

²¹ *FPC v Texaco, Inc.*, 377 U.S. 33, 39 (1964).

²² 47 C.F.R. § 1.3.

²³ *FPC v Texaco, Inc.*, 377 U.S. 33, 39 (1964)

²⁴ *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 416 (1971).

²⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

²⁶ *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁷ See 47 C.F.R. § 1.3; *Part 68 Waiver Request of Alameda Engineering Inc., et al, Order*, 10 FCC Rcd 12135, 12139 (1995).

²⁸ We note that WorldCom incorrectly states that the *IP Relay Order* granted IP Relay providers a one year waiver of the TRS speed of answer standard. We declined to waive the speed of answer requirement for IP Relay providers. See WorldCom’s *Petition* at 1; see also *IP Relay Order* 17 FCC Rcd 7779 at XX; 47 C.F.R. § 64.604(b)(2).

²⁹ Comments were filed by AT&T, Hamilton, CSD, SHHH, and TDI.

³⁰ 47 C.F.R. § 64.604(a)(4).

³¹ *IP Relay Order*, 17 FCC Rcd 7779 at ¶30.

ANI-based emergency system does not work for IP Relay and granted a one year waiver of this standard.)’ We believed that this was a reasonable time period for IP Relay providers to devise a method that would allow IP Relay providers to automatically transfer calls to emergency service providers, including location information.”

8. WorldCom asserts that traditional relay providers are able to comply with the Commission’s requirement for relay centers to automatically pass the ANI to the nearest PSAP because transmission of customer billing information based on location historically developed on the public switched telephone **network**.³⁴ WorldCom asserts that while Internet transmission requires an originating and terminating address, these addresses are not based on physical or geographic location like the public switched telephone network. Frequently an Internet user is assigned a different address for each Internet session, an address that does not contain geographic location information.³⁵ WorldCom states that currently there is no movement within Internet standards-setting bodies to develop protocols linking customer location with Internet addresses. Moreover, WorldCom notes that the mobile nature of computers adds to the difficulty of this issue. For example, a pre-determined emergency message may be set to transmit the user’s home location information, but this information may not be accurate if the user is accessing IP Relay using a laptop computer in a location other than his or her **residence**.³⁶

9. Sprint, Hamilton, and CSD support WorldCom’s request to extend the one year emergency service waiver for an indefinite period of time.” Hamilton posits that granting IP Relay providers **an** indefinite waiver of the emergency call handling TRS requirement would realistically tie the pace of technological development to the waiver period thereby allowing technology to drive such developments. Hamilton further argues that the Commission and TRS providers alike must work within the reality that geographical location is simply not a relevant dimension of IP Relay communications.)* In the alternative, Hamilton asserts that a five year waiver period would provide better incentives for TRS providers to deploy and provide IP Relay services, without fear that short waiver periods will interrupt TRS providers’ ability to obtain reimbursement from the TRS **Fund**.³⁹

10. TDI agrees that presently it is not technically feasible for emergency calls to be handled through IP Relay and supports waiver of the TRS emergency call handling requirement for a one year period.” TDI recognizes that the technical limitations may not be resolved within a one year period and recommends that the Commission judiciously allow for extension of the waiver upon the submission of technical feasibility reports by the E Relay provider at the end of the waiver **period**.⁴¹

11. In its comments, AT&T asserts that it can respond to an E Relay caller’s request to connect to an emergency agency by relying on its Emergency Call Handling data base, which allows for

³² One year waivers granted pursuant to the *IP Relay Order* became effective on April 22, 2002 and expire on April 22, 2003.

³³ *IP Relay Order*, 17 FCC Rcd 7779 at ¶30.

³⁴ WorldCom Comments at 3.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Sprint Comments at 1; Hamilton Comments at 4.

³⁸ Hamilton Comments at 4

³⁹ *Id.*

⁴⁰ TDI Comments at 1

⁴¹ *Id.*

the retrieval of emergency services by city/state, address, and/or telephone **number**.⁴² However, AT&T notes that the location information must be provided real time by the customer to the communications assistant. AT&T asserts that it is not feasible to rely on stored customer profile information regarding the caller's location, because IP Relay callers can potentially access IF Relay service from any city or state as long as they have an Internet **connection**.⁴³

12. The record reflects that the IP Relay providers will not have the technology or the means in place within the current one year waiver period to accurately and automatically transfer calls to emergency service providers, and to transfer the call with the location **information**.⁴⁴ Additionally, we note that no party, including representatives of the disability community, filed comments opposing a waiver of the TRS emergency call handling requirement for IP Relay providers. We will, therefore, waive the TRS mandatory minimum standard requiring emergency call handling for a five year period as applied to IP Relay providers. Because emergency call handling is an important function required by our TRS rules, we find that an indefinite waiver period is inappropriate: we do not want to discourage IP Relay providers from developing innovative means of meeting this important TRS requirement. To assist us in monitoring the rapid advancement taking place in IP Relay technology, we require IF Relay providers to submit an annual report updating the Commission on changes in IP Relay technology that may enable IF Relay providers to comply with the emergency call handling TRS requirement waived herein.

13. ***Voice Initiated Calls: Voice Carry Over (VCO) and Speech-to-Speech (STS).*** In the *IP Relay Order*, we waived for one year the requirement that IF Relay providers be accessible by voice, *i.e.*, that IP Relay providers offer VCO and STS, because of the technological limitations of providing these services at that time.⁴⁵ The record demonstrated that voice initiated calls were possible if the customer had a microphone, a sound card, and Internet telephony software. The record also indicated, however, that the quality of service of a voice call via one's computer over the Internet is poor and dependent on the quality of the user's customer premise equipment (CPE), frequently resulting in the communications assistant being unable to accurately communicate **conversations**.⁴⁶ WorldCom now seeks extension of the one year waivers for VCO and STS calls to either a five year or indefinite time, asserting that it still may be many years before the voice quality for these services significantly improves and the necessary CPE becomes widely adopted by the hearing and speech-disabled **community**.⁴⁷ Sprint, AT&T, Hamilton and CSD agree that the one year waivers for VCO and STS should be extended for five years or an indefinite period.⁴⁸ Specifically, Hamilton asserts that the waiver period should be extended until such time that the quality of voice Internet telephone service and CPE penetration justify such a **requirement**.⁴⁹

14. Based on the record,⁵⁰ we agree that a one year waiver for these voice initiated calls may be too short of a time period for the necessary technological advancements to become available to consumers and IP relay providers. We will, therefore, waive the minimum requirements to provide VCO and STS calls for a period of five years. Because of the public interest in having these services available

⁴² AT&T Comments at 5; *see also IP Relay Order* 17FCC Rcd 7779 at ¶30.

⁴³ AT&T Comments at 5.

⁴⁴ *See* AT&T Comments at 4; Hamilton Comments at 4.

⁴⁵ *IP Relay Order* 17FCC Rcd 7779 at ¶¶ 32, 57.

⁴⁶ *Id.*

⁴⁷ WorldCom Petition at 6.

⁴⁸ *See* Sprint Petition at 1; AT&T Comments at 6; Hamilton Comments at 5; and CSD Comments at 2.

⁴⁹ Hamilton Comments at 5.

⁵⁰ *See* Hamilton Comments at 5; AT&T Comments at 5-6.

to those individuals who need them, we find that it is not appropriate to grant an indefinite waiver of this TRS requirement. We emphasize that IP Relay should be available to voice users, and strongly encourage parties to seek technological advances to make these services possible.

15. **Hearing Carry Over (HCO).** Although the *IP Relay Order* waived the VCO and STS requirements, it did not waive the requirement to provide HCO because we found that IP Relay could be used for the text leg of the call.⁵¹ In its petition, Sprint seeks reconsideration of this decision, asserting that the provision of HCO requires the use of the same technology that is used to provide VCO.⁵² Sprint notes that both services require text messaging during one leg of the call, the only difference is the directional flow of the text. For VCO calls, the deaf or hard-of-hearing individual can speak to, but not hear the response from, the other party; the communications assistant sends such a response to the deaf or hard-of-hearing customer as a text message. For HCO calls, the individual with a speech disability can hear, but not speak to, the other party; the individual with a speech disability sends a text message to the communications assistant who then reads it to the other party.⁵³ Sprint asserts that the technological limitations that prevent the offering of VCO functionality through IP Relay apply equally to HCO functionality.⁵⁴

16. In its comments, AT&T asserts that the development of HCO functionality for IP Relay will be costly and could divert technical development funds from other features that would benefit the majority of IP relay users, such as developing faster access and faster connections to the called party.⁵⁵ Moreover, AT&T contends that customer demand should drive relay providers' development of this functionality, not preset waiver periods. AT&T supports waiving the HCO TRS mandatory minimum standard indefinitely or until such time as HCO is available to two or more IP Relay providers.⁵⁶ Hamilton asserts that the technological obstacles recognized in the *IP Relay Order* require waiver of HCO to encourage deployment of IP Relay by all potential providers and reimbursement for the costs of IP Relay functions that are currently feasible?⁵⁷ CSD and WorldCom also support waiver of this TRS mandatory minimum standard?⁵⁸ CSD notes that Sprint presently handles over 60 percent of all TRS calls in the United States: of these calls HCO and STS, when combined, comprise only .0006 percent of all TRS calls handled by Sprint.⁵⁹

17. SHHH and TDI support waiver of the one-line HCO TRS mandatory minimum standard for a one year period. SHHH and TDI agree that, unlike two-line HCO, it is not currently possible for IP Relay providers to offer one-line HCO.⁶⁰ Neither party supports a permanent waiver of this requirement arguing that the opportunity for technology to develop must remain open to permit one-line HCO through

⁵¹ See *IP Relay Order*, 17 FCC Rcd 7779 at ¶ 34.

⁵² Sprint Petition at 4; see also Hamilton Comments at 3-4; AT&T Comments at 6.

⁵³ Sprint Petition at 4-5.

⁵⁴ *Id.* at 5.

⁵⁵ AT&T Comments at 6.

⁵⁶ *Id.*

⁵⁷ Hamilton Comments at 4.

⁵⁸ See CSD Comments: WorldCom *ex parte* letter filed November 20, 2002.

⁵⁹ See *Ex Parte* letter from Karen Pelt Strauss, CSD Consultant, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated December 20, 2002. Moreover, in its *ex parte* presentation on December 4, 2002, CSD stated that with the implementation of STS service there has been a steady migration from HCO to STS use.

⁶⁰ SHHH Comments at 2, TDI Comments.

IP Relay for people with speech disabilities. SHHH and TDI encourage the Commission to require that IP Relay providers submit a yearly report on technological developments that may allow IP Relay providers to offer this service!

18. Because the same technological obstacles exist for HCO as for VCO and STS, we also grant IP Relay providers a waiver of the requirement to provide one-line HCO for a period of five years. We limit the waiver to a five year period to encourage continual development of the technology to provide one-line HCO service. To enable us to closely monitor the rapidly advancing technology of IP Relay, we require IP Relay providers to submit a report annually to the Commission on the status of the feasibility of providing one-line HCO.

19. 900 number *services*. In the IP Relay Order, we required IP Relay providers to offer 900 number **services**,⁶² stating that it was technically feasible for relay centers to accommodate these types of **calls**.⁶³ In its petition, Sprint asks us to waive this requirement, stating that it is technologically infeasible to provide such service at this time. Sprint states that “a carrier offering 900 number service requires that the ANI of the calling party be included in the signaling stream sent to its switch by either the calling party’s local exchange carrier or, in the case of TTY-based TRS service, the TRS center.”⁶⁴ If the ANI is not included in the signaling stream, the 900 service center carrier’s switch will reject the call either by returning a fast busy signal to the caller or by an announcement that the call cannot be completed as **dialed**.⁶⁵ Sprint contends that the only way for 900 calls to be completed is for the TRS center’s ANI to be inserted in the signaling stream transmitted to the 900 service carrier’s switch, or by asking the person accessing the relay center over the Internet to provide a telephone number for inserting into the signaling stream

20. Industry commenters agree with Sprint that the Commission should waive the 900 services TRS mandatory minimum standard for an indefinite period.” Specifically, AT&T agrees that it is not always possible for the communication assistant to provide the caller’s telephone number when connecting to 900 number services.⁶⁷ AT&T states that in the event a 900 number service was answered by a live attendant there would be no way to verify that the caller was providing his/her correct telephone number, and no way to verify if the number provided has a restriction on it for 900 number calls.” Hamilton asserts that the few possible ways to interject the customer’s number information would result in unacceptable risks that pay-per-call charges would be charged to the wrong party or fraudulently evaded.⁶⁹

21. SHHH and TDI support waiver of the 900 number TRS mandatory minimum standard for IP Relay providers, but would limit the waiver period to one year and require IP Relay providers to file an annual report on the feasibility of providing this service via IP Relay.⁷⁰ SHHH agrees that currently an

⁶¹ *Id.*

⁶² See 47 C.F.R. § 64.1501.

⁶³ *IP Relay Order*, 17 FCC Rcd 7779 at ¶¶ 34, 57.

⁶⁴ Sprint Petition at 3.

⁶⁵ *Id.* at 3-4.

⁶⁶ See AT&T Comments at 3, Hamilton Comments at 3, WorldCom Ex *Parte* letter filed November 20, 2002; CSD Comments.

⁶⁷ AT&T Comments at 3.

⁶⁸ *Id.*

“Hamilton Comments at 3.

⁷⁰ SHHH Comments at 2, TDI Comments.

IP Relay provider cannot pass an IP Relay user's telephone number to the carrier providing 900 number service, and that without such information, the carrier's switches will reject the call as there is no way to bill the caller. SHHH also notes that the number of 900 calls made "[t]hrough TRS is small – 10 a month for the entire nation" and that TRS users, if they wish, can make 900 calls through traditional TRS.⁷¹

22. Based on the record? we agree that the options proposed by the industry are not viable solutions for compliance with the 900 number call minimum standard. Inserting the **TRS** center's ANI in the signaling stream to complete 900 number calls would result in the TRS center being billed for the call rather than the consumer. Additionally, we recognize that it is not always possible for the relay center to provide the caller's telephone number to the pay-per-call service for billing, as frequently the 900 call terminates to a recorded announcement that is not answered by a live **attendant**.⁷³ For these reasons, we grant IP Relay providers a waiver of the 900 number requirement for a period of five years. We also require IP Relay providers to submit a report annually updating the Commission on any advancing technology that may allow IP Relay providers to offer 900 number service. We believe that, along with an annual reporting requirement, this is a reasonable time period for IP Relay providers to develop a method to resolve the billing problems associated with 900 number IP Relay calls.⁷⁴

23. **Retroactive Application of Waivers.** In the **IP Relay Order**, we clarified that TRS includes Internet-based relay services, and that providers of IP Relay services are eligible to recover their costs. To encourage the development of this emerging technology, and because it is technically impossible at this time to distinguish between intra and interstate IP Relay calls, we allowed all costs for Internet-based relay services to be recovered from the Interstate TRS Fund.⁷⁵ We also stated that to be certified and eligible for reimbursement, the IP Relay provider must meet all applicable TRS mandatory minimum standards, or request and receive waiver of these standards.⁷⁶

24. In its Ex **Parte** presentation, Sprint requested that if its petition for reconsideration is granted, the Commission clarify that Sprint (and other IP Relay providers that have been providing IP Relay service) are eligible to receive compensation for the entire past period in which such carriers offered IP Relay, even if they did not offer 900 number services or HCO during that time **period**.⁷⁷ Sprint states that it informed the TRS Fund Administrator that it was not offering 900 number services or HCO, because it was not technically feasible to do so, and has therefore not been receiving compensation for the costs of providing IP Relay. Sprint now posits that it would be unfair to penalize those providers (such as itself) that have been offering IP Relay to consumers, even though they could not certify that they were meeting the TRS mandatory minimum standards, since in granting its petition for reconsideration the Commission will have agreed that providing 900 number services and HCO is currently infeasible. Sprint also notes that denial of compensation on a retroactive basis will force these IP Relay providers to absorb the significant costs of providing IP Relay during the past period? WorldCom and TDI support the

⁷¹ SHHH Comments at 2.

⁷² See Sprint Comments at 4; AT&T Comments at 3; Hamilton Comments at 3.

⁷³ AT&T Comments at 3.

⁷⁴ We note that 900 number service is infrequently used by TRS users. See Letter dated November XX, 2002, from the National Exchange Carriers Association (NECA), filed in Docket No. 98-67, indicating that from January to September 2002 wireline TRS recorded 2,300 900 service calls minutes of use, compared to the three million minutes of use for all TRS services in October 2002.

⁷⁵ **IP Relay Order**, 17 FCC Rcd 7779 at ¶46. See also footnote 12 *supra* for discussion of Interstate TRS Fund

⁷⁶ **IP Relay Order**, 17 FCC Rcd 7779 at ¶33.

⁷⁷ See Sprint Ex parte letter dated November 18, 2002

⁷⁸ *Id.* at 2.

retroactive compensation of IP Relay providers who have been offering all mandated IP-Relay services except 900 number services and HCO.⁷⁹

25. We conclude that Sprint and other similarly-situated providers are not entitled to retroactive application of the waivers we grant in this Order, and that these waivers are prospective only. Permitting Sprint to recover compensation for past services rendered in violation of the then-applicable mandatory minimum standards, based on our present waiver of those standards, is tantamount to applying these waivers retroactively, a result that is generally not favored under existing law.⁸⁰ Sprint also has not demonstrated that it is in the public interest to retroactively apply the effective date of the waivers.

26. Sprint and other similarly-situated providers were well aware that their provision of IP Relay was not in compliance with the then-applicable rules, and thus they were not eligible for compensation from the interstate TRS Fund. These providers therefore had no settled expectation of payment for these services. We do not want to encourage common carriers and others to provide regulated services in contravention of our rules, with the hope that they eventually may be retroactively rewarded for providing the services. There were other avenues available to Sprint and the other similarly-situated carriers by which they could have determined whether they were offering IP Relay in compliance with applicable rules before they began offering the service and incurring the costs thereof. Further, other carriers may have chosen not to offer IP Relay when they knew they could not do so in compliance with our rules; their *compliance* with our rules would effectively be penalized if those who did not *comply* with the rules are nevertheless reimbursed for their services. That Sprint and other similarly-situated carriers chose to go ahead and offer the service, even though they could not comply with the rules, was their own decision.

27. This conclusion does not affect our underlying belief that IP Relay is a valuable addition to TRS because it permits consumers to access TRS through personal computers and similar devices. As Hamilton has noted, IP Relay use appears to be growing approximately 15 percent each month.” We believe that the availability of IP Relay will lead to competition in TRS, a regulated service that typically has only one provider per state. As a regulated service, however, TRS providers must comply with our rules to be a certified provider eligible for reimbursement.” As Sprint was not in compliance with the TRS mandatory minimum standards when it offered the IP Relay service, we cannot authorize reimbursement for its cost of providing that service.

IV. CONCLUSION

28. As we indicated in the *IP Relay Order*, all other TRS mandatory minimum standards apply to IP Relay.⁸³ We reiterate that the waivers we grant herein are temporary and are intended to facilitate the growth of IP Relay as a new service. We grant these waivers for a five year period because we believe that the growing customer demand for IP Relay services, and the rapid technological changes occurring in this industry, provide strong incentive for IP Relay providers to offer these services within this time period. We note that since the deployment of IP Relay there has been a steady increase in the

⁷⁹ See WorldCom *Ex parte* letter dated November 20, 2002; TDI Comments

⁸⁰ See, e.g., *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988); *McElroy Electronics Corp.*, 10 FCC Rcd 6762 (1995). As a general matter, rules adopted pursuant to notice-and-comment rule making procedures that change the past legal consequences of past actions are ‘primarily retroactive’ and therefore impermissible. 1998 Biennial Regulatory Review – Streamlining of Mass Media, *Memorandum Opinion and Order*, 14 FCC Rcd 17,525 par. 27 (1995).

⁸¹ See *Ex parte* letter from Hamilton dated December 2, 2002.

⁸² 47 C.F.R. § 64.604.

⁸³ See 47 C.F.R. § 64.604; see also *IP Relay Order*, 17 FCC Rcd 7779 at ¶34.

monthly minutes of use for TRS.⁸⁴ In granting these waivers we anticipate that more providers will be able to provide IP Relay which will allow more people to take advantage of this service. At the same time, we find that IP Relay providers should annually submit a report to the Commission, detailing the technical developments that have occurred to enable IP Relay providers to offer the TRS mandatory minimum standards waived herein. These waivers are granted with the requirement that IP Relay providers submit a report to the Commission twelve months after publication of this Order in the Federal Register. The report should be in narrative form detailing technological changes, progress made, and the steps taken to resolve the technical problems that prohibit IP Relay from meeting the TRS mandatory minimum standards waived herein. Such a report will facilitate our efforts to ensure that IP Relay users have all services required by our TRS rules that are technically feasible for IP Relay providers to offer. These waivers and reporting requirements will apply to all other current or prospective IP Relay providers, for the time periods indicated herein. For administrative convenience, all waivers granted herein will expire on **January 1, 2008**.

V. PROCEDURAL MATTERS

29. ***Final Regulatory Flexibility Certification.*** The Regulatory Flexibility Act of 1980, as amended (RFA)⁸⁵ requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that “the rule will not have a significant economic impact on a substantial number of small entities.”⁸⁶ The RFA generally defines “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration.

30. This item imposes a regulatory burden on IP Relay providers, requiring them to file an annual report with the Commission concerning the status of technology developed that will allow IP Relay providers to meet the telecommunications relay services mandatory minimum standards waived herein for IP Relay providers. Currently only three entities are providing IP Relay: AT&T, Sprint, and WorldCom. These are large entities. There is one entity, Hamilton Relay, Inc., that is preparing to offer IP Relay service which may be a small entity. The effect of this reporting requirement on any small business will not be significant. Based on the small number of entities providing IP Relay service, we conclude that this action will not cause a significant impact on small business. Based on the above, we conclude that our action will not affect a substantial number of small businesses.

31. Therefore, we certify that the requirements of this Order on Reconsideration will not have a significant economic impact on a substantial number of small entities. The Commission will send a

⁸⁴ See Chart dated December 13, 2002, from NECA, filed in Docket No. 98-67, indicating monthly usage of TRS including IP Relay.

⁸⁵ The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Act of 1996 (SBREFA).

⁸⁶ 5 U.S.C. § 605(b).

⁸⁷ 5 U.S.C. § 601(b)

⁸⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

copy of the Order on Reconsideration including a copy of this final certification, in a report to Congress pursuant to the Congressional Review Act of 1996⁸⁹ In addition, the Order on Reconsideration and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.⁹⁰

32. Paperwork Reduction Act. This Report & Order contains new or modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public and other Federal agencies are invited to comment on the new or modified collection(s) contained in this proceeding.

VI. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1.2 and 225 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152 and 225, this ORDER ON RECONSIDERATION IS ADOPTED.'

34. IT IS FURTHER ORDERED that WorldCom's Petition for Reconsideration IS GRANTED to the extent indicated herein.

35. IT IS FURTHER ORDERED that Sprint's Petition for Limited Reconsideration IS GRANTED to the extent indicated herein.

36. IT IS FURTHER ORDERED that IP Relay providers subject to the waivers granted shall submit annually a report, as indicated herein, to the Commission twelve months after publication of this Order on Reconsideration in the Federal Register.

37. IT IS FURTHER ORDERED that the late filed comments of Telecommunications for the Deaf, Inc., and Self Help for Hard of Hearing People are considered as part of the record in this proceeding.

38. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of the Order on Reconsideration, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

⁸⁹ See 5 U.S.C. § 801(a)(1)(A).

⁹⁰ See 5 U.S.C. § 605(b).

39. IT IS FURTHER ORDERED that the information collection(s) contained in the Order on Reconsideration SHALL BECOME EFFECTIVE following approval by the Office of Management and Budget in the Federal Register announcing the effective date for those sections.

40. Accessible formats (braille, large print, electronic files or audio recording) are available to persons with disabilities by contacting Brian Millin, of the Consumer and Governmental Affairs Bureau, at (202) 418-7426, TTY (202) 418-7365, or at bmillin@fcc.gov. This Order *on Reconsideration* can also be downloaded in Text and ASCII formats, at: <http://www.fcc.gov/cgb/dro>.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CC Docket 98-67, Order on Reconsideration.

I strongly support granting IP Relay providers the flexibility to provide this exciting new service without being forced to comply with certain regulatory mandates that were adopted with older technology in mind. I only regret that the Commission needlessly withheld this relief a year ago and forced providers to seek reconsideration. Last year, when the Commission found that IP Relay falls within the statutory definition of telecommunications relay services (TRS), we granted providers a one-year waiver from certain requirements (including standards regarding hearing carry over and 900 number service) that presented technical feasibility problems. I argued then that the Commission was being shortsighted in its grant of such limited relief.¹ I stated that the Commission should be more willing to refrain from extending legacy regulatory requirements to nascent technologies like IP Relay. By delaying the relief granted in today's Order, the Commission unfortunately denied cost-recovery to providers that rolled out this service in the face of regulatory uncertainty and may have deterred additional carriers from offering IP Relay service. I hope that, in future proceedings, the Commission will be quicker to recognize that the reflexive extension of legacy regulations to nascent technologies often harms the public interest.

¹ See Separate Statement of Commissioner Kathleen Q. Abernathy, *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-67, 17 FCC Rcd 7779 (2002).